Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1390

WANDA STARR WRIGHT, Individually and as Administratrix of the Estate of James Lewis Wright,
Plaintiff-Petitioner,

v.

SOUTHERN BELL TELEPHONE COMPANY,
Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT, SOUTHERN BELL TELEPHONE COMPANY, IN OPPOSITION TO THE PETITION OF WANDA STARR WRIGHT FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Wanda Starr Wright, has filed her petition asking that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on October 22, 1979. Southern Bell Telephone Company as Defendant-Respondent files this its brief in opposition thereto.

I. OPINION OF COURT OF APPEALS

Southern Bell Telephone Company, Defendant-Respondent, (hereinafter "Respondent") agrees that the opinion of the United States Court of Appeals for the Fifth Circuit is reported at 605 F. 2d 156, and agrees that the copy appended to the petitioner's petition is a true and correct copy of said opinion.

II. JURISDICTION OF THE UNITED STATES SUPREME COURT

Respondent agrees that petitioner's proper remedy is to invoke this Court's jurisdiction pursuant to Title 28, United States Code, Section 1254(1), which provides for review of judgments of the United States Courts of Appeals. Respondent further agrees that petitioner's motions for panel rehearing and for rehearing *en banc* were denied as set forth in petitioner's petition. Respondent further agrees that pursuant to Rule 41, Federal Rules of Appellate Procedure, and Fifth Circuit Local Rule 10(e) (13) the issue of the mandate was stayed pending determination of the relief Petitioner has requested. Respondent further agrees that the exhibits attached to Petitioner's petition and brief (inclusive of the judgment of the United States Court of Appeals for the Fifth Circuit, the notification of the order denying the petition for rehearing and for rehearing *en banc* and the stay of mandate) are true and correct copies. However, respondent denies that petitioner is entitled to a writ of certiorari as she prayed for.

III. THE QUESTION PRESENTED FOR REVIEW

Respondent urges that the only grounds for consideration of review on certiorari under the rules of the

United States Supreme Court (Rule 19) is that portion of said rule which provides as follows:

> "or has decided an important state or territorial question in a way in conflict with applicable state or territorial law;"

Respondent denies that the United States Court of Appeals for the Fifth Circuit has so acted, but agrees that it is the only grounds upon which petitioner may proceed in her petition for the grant of a writ of certiorari. Respondent denies that said opinion of the United States Court of Appeals for the Fifth Circuit decided a question of Georgia law in conflict with the applicable state law.

Respondent further disagrees with Petitioner's assertion that the law of Georgia was "abrogated" by the Court of Appeals in holding that Southern Bell was not liable for the Death of Wanda Starr Wright's husband, even assuming that Mr. Wright went under the mobile home to assist one of Respondent's employees at the request of such employee.

Respondent takes exception to the statement of Petitioner in paragraph III of her petition to the effect that Respondent's employee "directed" Mr. Wright to go under the structure. Petitioner further takes exception to the implication that Mr. Wright had no knowledge of the danger of crawling under the mobile home. The evidence in the record is clear to the effect that he had superior knowledge of such danger to Respondent's employee. (See Appendix to this Brief, page 1a and 2a.

Finally, Respondent's position is that said decision, judgment and opinion of the United States Court of Appeals for the Fifth Circuit is consistent with and entirely in accordance with the established law of the State of Georgia regarding all questions raised or decided therein.

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent agrees with petitioner's statement that there are none.

V. STATEMENT OF THE CASE

Respondent agrees with petitioner's statement of the case with the following exceptions:

(a) Petitioner says that the mobile home was not permanently underpinned. In fact, as recited in said opinion of the United States Court of Appeals for the Fifth Circuit:

> "When the mobile home was delivered to the Wrights it was not permanently secured. Instead it was supported by a single jack which was attached to the tongue of the mobile home and which rested solely on a concrete block."

Furthermore, in footnote 2 of its said opinion the United States Court of Appeals for the Fifth Circuit said:

> "The cause of the accident, Southern Bell argues, was a dangerous condition in the premises—the faulty support to the tongue of the mobile home. It is well settled in Georgia that the owner or occupier of premises is responsible for defects in those premises (Ga. Code Ann. §105-401). Because neither Southern Bell nor its employee had assumed dominion or control over the premises, it is urged that Southern Bell cannot be held liable for injuries caused by a defect in the premises under the control of Mr. Wright. We are much impressed by this argument, but need not decide the issue in view of our conclusion that Cox acted outside the scope of her employment,"

Respondent agrees with that portion of Petitioner's statement of the case wherein she says:

> "Southern Bell's policy is that no service person is to solicit assistance from customers."

In fact, Southern Bell had a specific rule directed to its own employees that in no event were they ever to seek the assistance of a customer or anyone in a customer's home, and that in the event they had troubles they were to call a Southern Bell dispatcher. (Appendix to this Brief, page 2a, 3a, and 4a.

Of course, Respondent disagrees with Petitioner's assertion that Mr. Wright was acting on the basis of a specific request from Mrs. Cox when he crawled under the trailer, but as noted in said opinion of the United States Court of Appeals for the Fifth Circuit, the jury verdict in plaintiff's favor requires that it be conceded that the jury must have found that there was such a request in order to reach its verdict.

Respondent also takes exception with that portion of Petitioner's statement of the case wherein she asserts:

> "This method of installation was contrary to the Southern Bell service manual which required that mobile home installations be done in such a way that crawling under the home would not be necessary."

The specific Southern Bell rule regarding wiring runs under mobile homes is set out on page 150 of the Appendix which is a part of the record in the Court below. (Appendix to this Brief, page 5a and 6a.) What it says is:

> "Wiring runs *should* be attached to the outer edge of the outrigger so that it will not be necessary to crawl under the mobile home." (Emphasis supplied.)

The point is that Southern Bell did not have a rule which directed its employees not to crawl under mobile

homes, but it encouraged them to make the wiring runs in such a way that it would not be *necessary* to crawl under the mobile home. There was no Southern Bell rule which absolutely prevented its employees from crawling under a mobile home if that became necessary as indeed it did in this case. In fact, the reason that crawling under the mobile home became necessary was because of the specific place where Mrs. Wright wanted one of the telephones installed. In fact, the record shows that Mrs. Wright directed Respondent's employee where to drill the holes in the floor. (Appendix to this Brief, page 7a.) The record shows that Mrs. Wright wanted a telephone in the kitchen hung up on a particular wall and in order to have it there the holes had to be drilled where Mrs. Wright directed Respondent's employee to drill them. (Appendix to this Brief, page 7a.) Thus, the necessity of crawling under the mobile home was brought about by a specific request of Southern Bell's customer and in crawling under the mobile home herself Mrs. Cox did not violate any of Respondent's rules.

Respondent also disagrees with Petitioner's statement to the effect that:

> "Jay was not familiar with the danger associated with his actions as was Cox who had installed telephones in mobile homes on prior occasions." (Petitioner's Brief, page 4).

Reference has already been made to the fact that the mobile home was temporarily secured as described in the opinion of the United States Court of Appeals for the Fifth Circuit previously quoted. The record shows that the trailer was brought to the Wright's trailer lot on a Friday and that it was on Monday when the accident occurred which resulted in Mr. Wright's death. (Appendix to this Brief, page 7a and 8a.) Thus, again, Respondent's position is that it is clear from the record that Mr. Wright

had superior knowledge regarding the dangers of crawling under the mobile home and the possibility of its falling as it did.

VI. ARGUMENT IN OPPOSITION TO GRANTING WRIT

In paragraph VI of her brief, Petitioner argues that:

> "Georgia agency and tort law was completely ignored in the opinion of the court of appeals." (sic) (Petitioner's Petition, page 6).

A reading of the opinion by the United States Court of Appeals for the Fifth Circuit is all that is necessary to demonstrate that such is not the case. Judge James Hill, who wrote the opinion, concurred in by Judges Simpson and Tjoflat, was a distinguished United States District Court judge in the State of Georgia prior to his elevation to the United States Court of Appeals for the Fifth Circuit. Prior to his becoming a District Court judge, Mr. Hill was an imminently successful Georgia trail practitioner. The opinion itself evidences Judge Hill's familiarity with the legal questions before the Court and his careful consideration of numerous Georgia cases touching on this question. It is manifestly incorrect to assert that Georgia agency and tort law were ignored in the opinion written by Judge Hill.

However, the major thrust of Petitioner's brief and petition is that the instant case is controlled by the case of *Higgins* v. *D & F Electric Company,* 110 Ga. App. 790, 140 S.E. 2d 99 (1964). This has been the petitioner's position throughout this case from the trial through her petition for issuance of a writ of certiorari. In the opinion of the United States Court of Appeals for the Fifth Circuit, Judge Hill very carefully and very definitively distinguished the *Higgins* case from the facts now before this Court. Judge Hill pointed out that in *Higgins* v. *D & G*

Electric Company, supra, the question was decided by the Georgia Appellate Court on a demurrur to the plaintiff's complaint. Judge Hill made it clear that under Georgia procedure in effect at that time, on a demurrur, the Georgia Appellate Court was required to assume that the facts alleged in the complaint were true. Judge Hill's point was that in the *Higgins* complaint there was a specific allegation that the defendant's employee there was acting within the scope of the authority conferred upon him by his employer. Thus, in *Higgins* the Georgia Appellate Court had to assume that the plaintiff's allegation that the defendant's employee was within the scope of his employment when he directed another person to assist him was true. In addition to this "procedural" distinction, Judge Hill went on to point out that in *Higgins* the question of whether or not the decedent's status as a volunteer was without relevance in the instant case. Judge Hill pointed out that the question of being a volunteer would be important if plaintiff's theory of recovery was that at the time of his death the plaintiff's husband had been a servant of Respondent. Judge Hill went on to point out that in the case at bar plaintiff was relying on the doctrine of respondeat superior.

Most persuasively, however, in Judge Hill's opinion was his citation of and reliance on the case of *Huddle House, Inc.* v. *Burke,* 133 Ga. App. 643, 647, 211 S.E. 2d 903, 907 (1974). Judge Hill quoted from that case as follows:

> "No employee has power to employ another to assist him in his work without express authority; and if he does so, he is acting without the scope of his authority."
> (Appendix to Petitioner's Petition, p. 3).

Nothing could be clearer than that the United States Court of Appeals for the Fifth Circuit has not decided this

case in conflict with applicable Georgia law, but rather has carefully considered the Georgia statutes and cases applicable and arrived at a result which is in accordance with the law of Georgia.

The *Huddle House* case is only one example. A number of Georgia cases were cited toward the end of the opinion (Appendix to Petitioner's Petition, page 4) regarding the result when a servant disobeys instructions from his master. The opinion of the United States Court of Appeals for the Fifth Circuit specifically recognizes that such departures do not necessarily insulate a master from liability for the servant's negligence.

However, petitioner goes on to argue that the United States Court of Appeals for the Fifth Circuit opinion either did not deal with or incorrectly applied the Georgia law as to *apparent* authority. While this subject matter might be a proper topic for extensive argument and citation of authority were this Court to grant a writ of certiorari, it is sufficient to note here only that there simply was no evidence in the record at trial nor before the Court below from which a conclusion or inference could be drawn that Mrs. Cox had the apparent authority to ask the decedent to assist her. The only evidence on this matter is that previously referred to wherein Mrs. Wright testified that Mrs. Cox asked her husband to crawl under the house. No other facts showing any apparent authority on the part of Mrs. Cox to ask for the assistance of other persons appears in the record. In fact, as noted in *Huddle House, Inc.* v. *Burke,* supra, the Georgia rule is that it requires *express* authority for an employee to have the power to employ another to assist him. It is the nature of the beast in business operations that the power to hire and fire and to obtain temporary or permanent assistance is a managerial function. Thus, the rationale of the law when it comes to matters dealing with *apparent* authority to ob-

tain the assistance of another in an employment-like capacity is that the person holding himself out as authorized to do the "hiring" must appear by circumstances or other evidence to be clothed with that authority. The record in this case is devoid of any such evidence or circumstances. Mrs. Cox was an installation employee and clearly one not clothed with managerial-type discretion or authority.

The rule on apparent authority in Georgia is as stated at 3 Am. Jur. 2d §75, at 477-78 (1962):

> "In order to establish that an agent had the apparent authority to do the act in question, it must be established (l) that the principal has manifested his consent to the exercise of such authority or has knowingly permitted the agent to assume the exercise of such authority; (2) that the third person knew of the facts and, acting in good faith, had reason to believe, and did actually believe, that the agent possessed such authority; and (3) that the third person relying on such appearance of authority has changed his position and will be injured or suffer loss if the act done or transaction executed by the agent does not bind the principal. Manifestly, a party dealing with an agent must prove that the facts giving color to the agency were known to him when he dealt with the agent, and that he believed the agent ws acting within his authority; if he has no knowledge of such facts, he does not act in reliance upon them and is in no position to claim anything on account of them." *(See also Buffalo Insurance Co.* v. *Star Photo Finishing Co.* 120 Ga. App. 697, 705, 172 S.E. 2d 159 (1969); *National Homes, Inc.* v. *City Plumbing & Heating Supply Company,* 108 Ga. App. 519, 133 S.E. 2d 416 (1963); *Piedmont Operating Co.* v. *Cummings,* 40 Ga. App. 397, 149 S.E.814 (1929).

Respondent believes that the opinion of the United States Court of Appeals for the Fifth Circuit of itself suffi-

ciently deals with and disposes with the other arguments and citations of Georgia authority in the petition for a writ of certiorari.

Finally, Respondent would call the Court's attention to that portion of the opinion below wherein Judge Hill made reference to Respondent's "persuasive argument" that the proximate cause issue could be decisive had the case not been decided on the basis of Mrs. Cox's lack of authority. As previously noted, footnote 2 of the opinion calls attention to the case of *Standard Oil Company* v. *Harris,* 120 Ga. 768, 172 S.E. 2d 344 (1969) for the proposition that the real and proximate cause of the death of Mr. Wright was a defect in the premises under Mr. Wright's own control. Respondent cites *Standard Oil Company* v. *Harris,* supra, and the reasoning of the Court below in connection with this point is an additional reason for the denial of a writ of certiorari in the case now before this Court.(See Appendix to Petitioner's Petition, pages 2 & 3).

VII. CONCLUSION

(a) The United States Court of Appeals for the Fifth Circuit correctly decided this case and correctly analyzed and applied the law of Georgia and did so in such a way that there is no conflict with any applicable law of the State of Georgia.

(b) The United States Court of Appeals for the Fifth Circuit correctly applied the law of Georgia with respect to the question of the lack of authority on the part of Mrs. Cox to ask for the assistance of the decedent.

(c) The United States Court of Appeals for the Fifth Circuit correctly determined that there was no evidence of apparent authority on the basis of which a verdict in the Petitioner's favor could be upheld.

WHEREFORE, Respondent respectfully requests this Honorable Court deny the Petitioner's application and petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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February 29,1980.

APPENDIX

EXCERPTS FROM APPENDIX OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Q. Did you see what she was doing?

A. She was drilling a hole in the floor.

Q. What happened after that? What did she do?

A. She drilled a hole in the floor and she put the wire in, and she got up and she went outside.

Q. All right. Let me ask you this. Where was Jay?

A. Jay was leaning up against the counter right at the sink?

Q. In the kitchen?

A. Yes, in the kitchen. He was standing there talking to me. The icebox opened up to the white, and I had it open and I was standing there. We were kind of facing each other while I was washing the icebox.

Q. And she went outside?

A. Yes, sir. She went outside.

Q. Did she come back in the trailer?

A. Yes, sir. She came back in the trailer. And she said she coldn't get the wire through, and she asked Jay if he would mind pushing the wire through and let her go back out there and she would get it.

Q. Did Jay help her do that?

A. Yes.

Q. All right. What happened on the second trip out?

A. She came back in. She said she still couldn't get it and to tap on the floor, he said okay - and she went back

A. (Cont'd) outside. He tapped on the floor - and she came back in. . .

Q. What was he tapping on the floor with, Starr?

A. His knife.

Q. Was that the knife he borrowed from Mr. Bradham?

A. Yes,sir.

Q. Okay. Was she able to find it?

A. No, Sir. She said she could hear him tapping, but she still couldn't find the wire.

Q. Then what happened?

A. She asked him if he would mind going outside and let her push the wire through and see if he could find it.

Q. Did he agree to do that?

A. Yes, sir. He went outside. She walked out with him. She came back in and she pushed the wire down. She started back out the door. Then she turned around and she looked at me and she said, "Would you watch the wire in the box and if it starts tangling, would you straighten it out?" I said, "Okay." She walked out the door and she came back in. Just as she started to stoop down, it—it fell.

Q. Did you go outside?

A. Yes,sir. We both ran out the door.

Q. Okay. And I believe Mrs. Cox called the operator and got the ambulance there?

A. Yes, sir.

* * *

Q. (Cont'd) trial, is that correct?

A. Yes,sir.

Q. You heard him testify that the rules at Southern Bell, the rules that applied to installing telephones, did not change after May 19th, 1975, with respect to mobile homes?

A. That is correct.

Q. And you agree with that?

A. That is correct.

Q. So you-all were using the same rules before this happened as you used after it happened?

A. Yes.

Q. I believe one of the rules that you-all have at Southern Bell in installing telephones is that when an installer is putting phones in and comes to a problem that you cannot handle, that you call the dispatcher and ask for assistance?

A. That's correct.

Q. That is a company rule? And I believe you testified prior to this trial, Mrs. Cox, that you were familiar with mobile homes, that you install phones in them,and you've told us here today around fifty percent of your time is spent with mobile homes?

A. That's correct.

Q. So you are familiar with them. And you understand what it means when a trailer is blocked up and not blocked up?

* * *

Q. (Cont'd) tongue was resting on the block?

A. Yes, sir. This was underneath the. . .

Q. All right. Take your seat. I believe you told me before, Mrs. Cox, that this rule about seeking assistance was taught to you in the beginning of your training, that if you needed help, you would call the dispatcher and ask for Mr. Ransom or one of your supervisors to come help you?

A. This is correct, yes.

Q. If you can't do it yourself, you get somebody from the Bell Telephone Company to come help you?

A. Yes, sir.

Q. Now, May 19th, Mrs. Cox, what time did you get to the New Hope Trailer Park?

A. Somewhere around eleven a.m.

Q. All right. Had you been to this particular place before, this trailer park?

A. Yes, sir.

Q. You had been there to install other telephones?

A. Yes, I installed the one she had before.

Q. In her old trailer?

A. Yes, sir.

Q. Was that the same type installation?

A. No. In this trailer she had—her new trailer had never been wired for phones before.

Q. The old trailer had been wired?

* * *

Q. That's been the Bell Telephone creed, I guess, since the company was founded?

A. Since I've been employed by. . .

Q. Your seventeen years?

A. Yes, sir.

Q. Mr. Ransom, with respect to this rule—you-all have a rule, as I understand it, according to Mrs. Cox, that when a person cannot do the job himself, a Bell Telephone employee cannot do the job, the company policy or rule is to call and ask for assistance from Bell Telephone, is that a correct statement?

A. Yes, sir. That's basically true.

Q. And that rule means you do not ask for assistance from customers, is that true?

A. That's True.

Q. And you just read the creed tht says no job is so important that it cannot be done with enough time involved, and I believe she had two hours to do this job?

A. She had as much time as was necessary to do the job.

Q. She wasn't really limited to two hours then?

A. No, sir.

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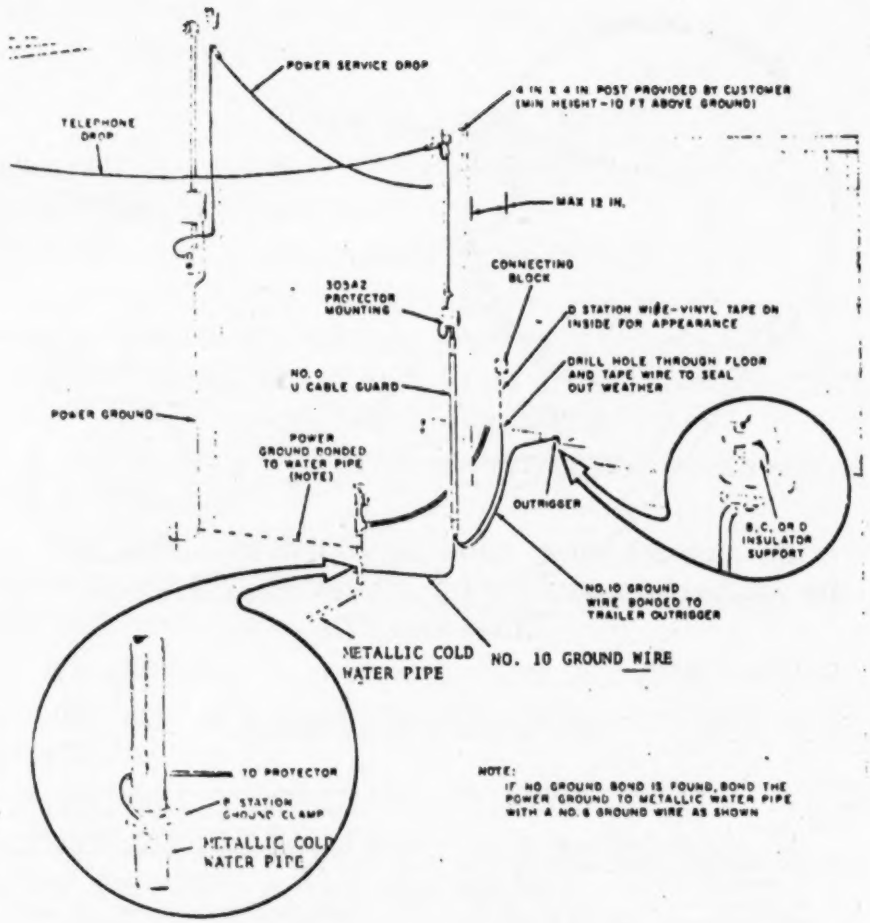
POWER SERVICE DROP
4 IN X 4 IN POST PROVIDED BY CUSTOMER (MIN HEIGHT-10 FT ABOVE GROUND)
TELEPHONE DROP
MAX 12 IN.
CONNECTING BLOCK
305A2 PROTECTOR MOUNTING
D STATION WIRE-VINYL TAPE ON INSIDE FOR APPEARANCE
DRILL HOLE THROUGH FLOOR AND TAPE WIRE TO SEAL OUT WEATHER
NO. 0 U CABLE GUARD
POWER GROUND
POWER GROUND BONDED TO WATER PIPE (NOTE)
OUTRIGGER
B, C, OR D INSULATOR SUPPORT
NO. 10 GROUND WIRE BONDED TO TRAILER OUTRIGGER
METALLIC COLD WATER PIPE
NO. 10 GROUND WIRE
TO PROTECTOR
D STATION GROUND CLAMP
METALLIC COLD WATER PIPE
NOTE:
IF NO GROUND BOND IS FOUND, BOND THE POWER GROUND TO METALLIC WATER PIPE WITH A NO. 6 GROUND WIRE AS SHOWN

Fig. 6—Aerial Service Protector Grounded to Water Pipe

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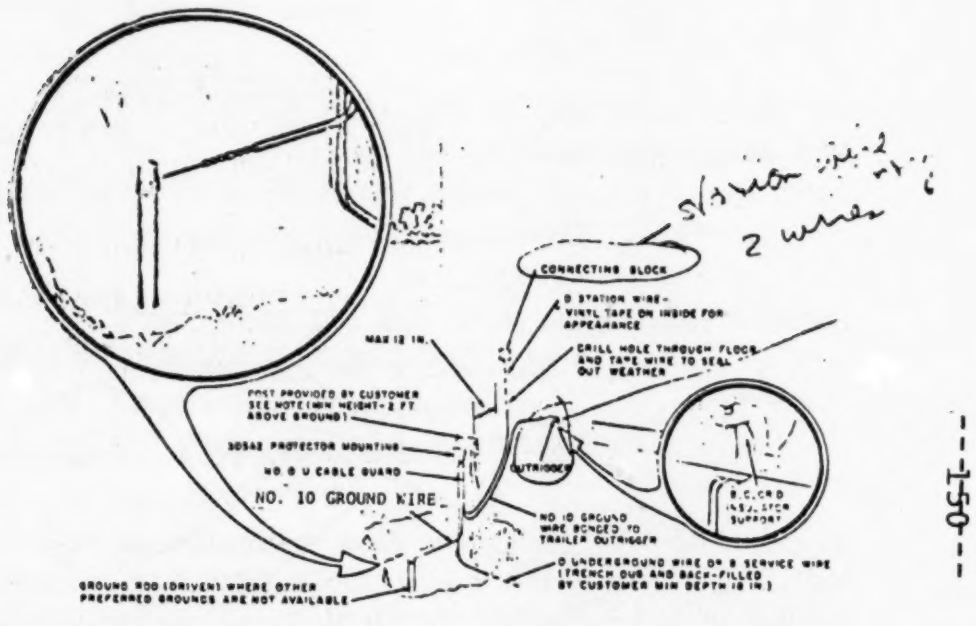
CONNECTING BLOCK
MAX 12 IN.
POST PROVIDED BY CUSTOMER SEE NOTE (MIN HEIGHT-2 FT ABOVE GROUND)
NO. 10 GROUND WIRE
OUTRIGGER
GROUND ROD (DRIVEN) WHERE OTHER PREFERRED GROUNDS ARE NOT AVAILABLE

NOTE
4 IN X 4 IN WOOD POST OR A COMMERCIALLY AVAILABLE METAL POST THAT PROVIDES MOUNTING FACILITIES FOR PROTECTOR, WIRE AND U CABLE GUARD

Fig. 5—Buried Service Protector Grounded to Ground Rod

and the same wiring methods used for single family dwellings, built on site, can be used for mobile homes.

4.10 The heating, plumbing, sewer, and water pipes run down the center. Electrical wiring is in the outside walls of the mobile home (see Fig. 8), approximately 16-inches above the finished floor level or in the ceiling, leaving the floor area along the outside walls free for drilling for station wire entry. Drill straight down through plywood floor avoiding outriggers. Use care when drilling the soft insulating board covering the bottom of the mobile home as it tears easily. Seal holes around station wire to prevent entrance of air and moisture. If it should be necessary to install a telephone on an interior wall of the mobile home, use extreme caution in penetrating floor to avoid damage to other equipment.

4.11 Wiring runs should be attached to the outer edge of the outrigger so that it will not be necessary to crawl under the mobile home. Fasten B insulator supports equipped with K bridle rings (or equivalent) to outer edge of outriggers. Attach wire to mobile home by running through bridle ring, folding back and taping, or clamping to insulator support with a B ground wire clamp or

Q. Mr. Ransom, I assume you know the difference in mobile homes when they are set up permanently or when they are temporarily set up?

A. I would say so.

* * *

Q. You did not tell the police officers at that time, Mrs. Wright, that Mrs. Cox had asked your husband to go under the trailer, did you?

A. I don't really remember what I told them.

Q. In fact, Mrs. Wright, as you previously testified, you have never told anyone other than your lawyers that Mrs. Cox asked Mr. Wright to go under the house, isn't that right?

A. We were told—I've never discussed it with any of the neighbors.

Q. Mrs. Cox drilled the holes in the floor, as shown by these red dots on this diagram, where you and Jay asked her to drill them, isn't that right?

A. Yes, sir.

Q. You-all wanted this phone in the kitchen hung up on this wall here?

A. Yes, sir.

Q. And you asked her to drill the hole in the floor where she drilled it, isn't that right?

A. Yes, sir.

Q. Now, as I understand it, Mrs. Wright, you were there when they brought the trailer on this Friday before the accident happened, right?

A. Yes, sir.

Q. And I'm sorry, I just couldn't hear a part of your testimony—you said they brought the trailer, if I understood

Q. (Cont'd) you. Were there two people or one?

A. It was one man.

Q. Just this guy named Doug. . .

A. Doug.

Q. . . .apparently that Mrs. Cribbs, Q.T., was talking about?

A. Yes, sir.

Q. And you were they when they brought it, I take it, you saw him put it up on the block, right?

A. I wasn't watching him. I saw it sitting on the block, but I didn't—I was talking to Q.T. about the trailer.

Q. In any event, if I understood your testimony, it was. . .

A. Yes, it was sitting. . .

Q. . . .sitting up on the. . .

A. . . .on the block.

Q. You saw it sitting up on the block?

A. Yes.

Q. And Mr. Wright knew it was sitting up on the block like it was, didn't he?

A. Yes.

Q. You-all went out—you and he looked at it together, didn't you?

A. We didn't go around the front and examine it.